

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FRANCIS A. ROTH,)
Plaintiff,) No. CV-06-0067-CI
v.) ORDER GRANTING DEFENDANT'S
LINDA S. MCMAHON, Commissioner) MOTION FOR SUMMARY JUDGMENT
of Social Security,¹)
Defendant.)

)

BEFORE THE COURT are Plaintiff's Motion for Summary Judgment (Ct. Rec. 12) and Defendant's Motion for Summary Judgment (Ct. Rec. 16), noted for hearing without oral argument on October 16, 2006. (Ct. Rec. 9.) Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 18.)

¹ As of January 20, 2007, Linda S. McMahon succeeded Defendant Commissioner Jo Anne B. Barnhart as Acting Commissioner of Social Security. Pursuant to FED. R. CIV. P. 25(d)(1), Commissioner Linda S. McMahon should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405 (g).

1 After reviewing the administrative record and the briefs filed by
2 the parties, the court **GRANTS** Defendant's Motion for Summary
3 Judgment (Ct. Rec. 16), and **DENIES** Plaintiff's Motion for Summary
4 Judgment. (Ct. Rec. 12.)

5 **JURISDICTION**

6 Plaintiff applied for Disability Insurance Benefits ("DIB") on
7 May 12, 2003. (Tr. 92-95.) He alleged disability due to crushed
8 disks, arthritis and fusions, with an alleged onset date of November
9 15, 1996. (Tr. 92-95.) The application was denied initially (Tr.
10 61) and on reconsideration. (Tr. 67-68.) Plaintiff appeared before
11 ALJ James A. Burke on May 11, 2005. The ALJ heard the testimony of
12 Plaintiff and vocational expert Tom Moreland. (Tr. 36-58.) The ALJ
13 issued a decision on June 30, 2005, finding that Plaintiff was not
14 disabled. (Tr. 18-32.) The Appeals Council denied a request for
15 review on January 25, 2006. (Tr. 6-8). Therefore, the ALJ's
16 decision became the final decision of the Commissioner, which is
17 appealable to the district court pursuant to 42 U.S.C. § 405(g).
18 Plaintiff filed this action for judicial review pursuant to 42
19 U.S.C. § 405(g) March 1, 2006. (Ct. Rec. 1.)

20 **STATEMENT OF FACTS**

21 The facts have been presented in the administrative hearing
22 transcript, the ALJ's decision, the briefs of both Plaintiff and the
23 Commissioner and will only be summarized here.

24 Plaintiff was 52 years old on the date of the ALJ's decision.
25 (Tr. 18.) He has a high-school education and has worked as an
26 auto/heavy equipment mechanic, auto body repairman, and painter.
27 (Tr. 18.) Plaintiff alleges disability since November 15, 1996, due
28 to crushed disks, arthritis and fusions. (Tr. 18.)

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a Plaintiff is not only unable to do previous work but cannot, considering Plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

17 The Commissioner has established a five-step sequential
18 evaluation process for determining whether a person is disabled. 20
19 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is
20 engaged in substantial gainful activities. If so, benefits are
21 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
22 the decision maker proceeds to step two, which determines whether
23 Plaintiff has a medically severe impairment or combination of
24 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

25 If Plaintiff does not have a severe impairment or combination
26 of impairments, the disability claim is denied. If the impairment
27 is severe, the evaluation proceeds to the third step, which compares
28 Plaintiff's impairment with a number of listed impairments

1 acknowledged by the Commissioner to be so severe as to preclude
2 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),
3 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App. 1. If the
4 impairment meets or equals one of the listed impairments, Plaintiff
5 is conclusively presumed to be disabled. If the impairment is not
6 one conclusively presumed to be disabling, the evaluation proceeds
7 to the fourth step, which determines whether the impairment prevents
8 Plaintiff from performing work which was performed in the past. If
9 a Plaintiff is able to perform previous work, that Plaintiff is
10 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
11 416.920(a)(4)(iv). At this step, Plaintiff's residual functional
12 capacity ("RFC") assessment is considered. If Plaintiff cannot
13 perform this work, the fifth and final step in the process
14 determines whether Plaintiff is able to perform other work in the
15 national economy in view of Plaintiff's residual functional
16 capacity, age, education and past work experience. 20 C.F.R. §§
17 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137
18 (1987).

19 The initial burden of proof rests upon Plaintiff to establish
20 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
21 v. *Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172
22 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once
23 Plaintiff establishes that a physical or mental impairment prevents
24 the performance of previous work. The burden then shifts, at step
25 five, to the Commissioner to show that (1) Plaintiff can perform
26 other substantial gainful activity, and (2) a "significant number of
27 jobs exist in the national economy" which Plaintiff can perform.
28 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

25 It is the role of the trier of fact, not this court, to resolve
26 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
27 supports more than one rational interpretation, the court may not
28 substitute its judgment for that of the Commissioner. *Tackett*, 180

1 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
2 Nevertheless, a decision supported by substantial evidence will
3 still be set aside if the proper legal standards were not applied in
4 weighing the evidence and making the decision. *Brawner v. Secretary*
5 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987).
6 Thus, if there is substantial evidence to support the administrative
7 findings, or if there is conflicting evidence that will support a
8 finding of either disability or nondisability, the finding of the
9 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
10 1230 (9th Cir. 1987).

11 **ALJ'S FINDINGS**

12 The ALJ found at the onset that Plaintiff meets the disability
13 requirements set forth in Section 216(I) of the Social Security Act
14 and was insured for disability benefits through September 30, 1998.
15 (Tr. 19.) The claimant was therefore required to establish
16 disability prior to this date. (Tr. 19.) The ALJ found at step one
17 that Plaintiff has not engaged in substantial gainful activity
18 during any time at issue. (Tr. 19.) At step two, the ALJ found that
19 the medical evidence established that during the relevant time
20 frame, Plaintiff suffered from chronic neck pain (status post C5-6,
21 C6-7 anterior disectomy and fusion disk bulge), an impairment
22 considered severe but not severe enough to meet or medically equal
23 one of the Listings impairments. (Tr. 27.) The ALJ concluded the
24 record did not establish that Plaintiff suffered from a severe
25 mental impairment, carpal tunnel syndrome which had more than a
minimal impact on the ability to do work-related activities,
disabling right ankle, knee or foot pain, or tinnitus that would
limit Plaintiff's ability to work. (Tr. 20-21, 26-27.) The ALJ

1 found Plaintiff's testimony regarding his limitations not fully
2 credible (Tr. 29), and concluded that Plaintiff has the RFC to
3 perform a wide range of work of light work. (Tr. 27.) At step four
4 the ALJ concluded that Plaintiff is unable to perform his past work.
5 (Tr. 29.) It is the Commissioner's burden at step five to show that
6 there are jobs existing in significant numbers in the national
7 economy which Plaintiff can perform, consistent with his medically
8 determinable impairments, functional limitations, age and education.
9 At step five, in response to the ALJ's hypothetical question, the
10 vocational expert testified that a person having the hypothesized
11 conditions could perform such jobs as a cashier II, laundry worker,
12 agricultural produce sorter, and poultry worker, and that a
13 significant number of these jobs existed in the state and national
14 economy. Accordingly, the ALJ determined at step five of the
15 sequential evaluation process that Plaintiff was not disabled within
16 the meaning of the Social Security Act. (Tr. 30-31.)

ISSUES

18 Plaintiff contends that the Commissioner erred as a matter of
19 law, and assigns six errors; the court addresses four.²

21 ² Plaintiff first assigns error to the ALJ's failure to request
22 the assistance of an orthopedist as a medical expert. (Ct. Rec. 13
23 at 7.) This contention is not supported by argument or citation to
24 authority elsewhere in the Memorandum; the court deems it waived.
25 Similarly, Plaintiff's second assigned error is the ALJ's failure to
26 utilize a psychologist as a medical expert. (Ct. Rec. 13 at 7.)
27 This contention also does not appear in the Memorandum, but is
28 listed as an issue. For the same reason, this issue is also deemed

1 Specifically, he argues that the ALJ erred when he (1) found that
2 Plaintiff does not suffer from a severe mental impairment; (2)
3 weighed the opinion of his treating physician; (3) assessed
4 Plaintiff's RFC, and (4) asked the vocational expert an incomplete
5 hypothetical.³ (Ct. Rec. 13 at 7-12.)

6 The Commissioner opposes the Plaintiff's motion and asks that
7 the ALJ's decision be affirmed. (Ct. Rec. 17 at 6-17.)

8 **DISCUSSION**

9 **A. Severe Impairment**

10 Plaintiff contends that the ALJ erred by finding that his
11 mental impairment was not severe. (Ct. Rec. 13 at 9-11.)
12 Specifically, Plaintiff argues that the ALJ should have considered
13 an ER doctor's September 1997 assessment of his depression because
14 it predated his date of last insured and assessed a GAF of 30,
15 indicating a serious impairment in communication or functioning or

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19 waived. Plaintiff's fourth assigned error is the ALJ's failure to
20 consider his pain complaints in light of assessed mental
21 impairments. This issue is resolved by the ALJ's finding at step 2
22 that Plaintiff's mental impairment is not "severe" as defined by the
23 regulations.

24 ³Plaintiff fails to list the incomplete hypothetical as an
25 assignment of error (Ct. Rec. 13 at 7), but argues with citation to
26 authority that the hypothetical failed to include all of his
27 limitations. (Ct. Rec. 13 at 11-12.) The court considers this
28 argument.

1 an inability to function in almost all areas.⁴ (Ct. Rec. 13 at 9.)
 2 The Commissioner responds that the ALJ correctly found that
 3 Plaintiff's depression did not result in any significant work-
 4 related limitations "because it was situational in nature and did
 5 not persist for twelve months." (Ct. Rec. 17 at 8.)

6 An impairment or combination of impairments is not severe if it
 7 does not significantly limit one's physical or mental ability to do
 8 basic work activities. See 20 C.F.R. §§ 404.1521; 416.920(c). In
 9 other words, an impairment is severe if it has more than a minimal
 10 effect on an individual's ability to do basic work activities.
 11 *Smolen v. Chater*, 80 F. 3d 1272, 1290 (9th Cir. 1996). To be
 12 considered "severe," limitations also must meet the Act's
 13 requirement that they last for 12 consecutive months. 42 U.S.C. §
 14 1382c(a)(3)(A). The ALJ found that the record did not contain
 15 sufficient evidence that Plaintiff suffered from a mental impairment
 16 for a continuous twelve-month period between the date of onset
 17 (November 15, 1996) and his date last insured (September 30, 1998).
 18 (Tr. 26.)

19 Substantial evidence supports the ALJ's conclusion that
 20 Plaintiff's depression was not severe, as defined by the
 21 regulations. The ALJ notes when Plaintiff's treating orthopedist,
 22 Dr. Anderson, observed in September of 1997 that he was severely
 23 depressed and had suicidal ideation, he directed Plaintiff to seek
 24 treatment immediately. (Tr. 26.) Plaintiff was taken to the hospital
 25 from Dr. Anderson's office for a psychiatric evaluation. At the

27 ⁴DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4th Ed. (DSM-IV),
 28 at 32 (1995).

1 time Plaintiff was homeless and suffering financial problems; he had
2 taken Prozac for one month. (Tr. 26.) At the hospital Plaintiff was
3 diagnosed with major depression, possibly a somatization disorder,
4 and referred for outpatient mental health treatment and medication
5 support. (Tr. 21, 26.) The ALJ notes that the record shows no
6 further psychological or psychiatric treatment during the relevant
7 time frame. (Tr. 21, 26.) Plaintiff's mental state is not again
8 discussed in the record until he was evaluated for vocational
9 rehabilitation in 2002 by Drs. Bostwick and Bot, four years after
10 the date last insured, and found to be a good candidate. (Tr. 26.)
11 And, the ALJ observed, neither of these physicians diagnosed
12 depression. (Tr. 26.) The ALJ concluded that Plaintiff suffered from
13 depression, but it was situational in nature and did not persist for
14 twelve consecutive months during the period at issue, from November
15 of 1996 to September of 1998. (Tr. 26.)

16 A careful review of the record reveals substantial evidence
17 supports the ALJ's finding at step two. Other than Plaintiff's
18 hospital evaluation, there is no evidence of any mental impairment
19 or mental health treatment in the record during the relevant period.
20 Plaintiff fails to meet his burden of establishing that his
21 depression was a severe impairment within the meaning of the
22 regulations during the relevant time period. See *Tackett v. Apfel*,
23 180 F.3d 1094, 1098 (9th Cir. 1999) (holding that, if the evidence
24 reasonably supports a social security decision, the court must
25 uphold the decision and may not substitute its judgment for the
26 agency's).

27 **B. Weighing Medical Evidence**

28 In social security proceedings, the claimant must prove the

1 existence of a physical or mental impairment by providing medical
2 evidence consisting of signs, symptoms, and laboratory findings; the
3 claimant's own statement of symptoms alone will not suffice. 20
4 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
5 the basis of a medically determinable impairment which can be shown
6 to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical
7 evidence of an underlying impairment has been shown, medical
8 findings are not required to support the alleged severity of
9 symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).

10 A treating or examining physician's opinion is given more
11 weight than that of a non-examining physician. *Benecke v. Barnhart*,
12 379 F.3d 587, 592 (9th Cir. 2004). If the treating or examining
13 physician's opinions are not contradicted, they can be rejected only
14 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,
15 830 (9th Cir. 1996). If contradicted, the ALJ may reject an opinion
16 if he states specific, legitimate reasons that are supported by
17 substantial evidence. See *Flaten v. Secretary of Health and Human*
18 *Serv.*, 44 F. 3d 1453, 1463 (9th Cir. 1995).

19 Plaintiff contends that the ALJ erred by rejecting the opinions
20 of his treating physician, Sharon Loomis, M.D. (Ct. Rec. 13 at 10-
21 11.) The Commissioner responds that the ALJ properly weighed the
22 medical evidence and credited some of Dr. Loomis' opinions. (Ct.
23 Rec. 17 at 10-11.)

24 Sharon Loomis, M.D., saw Plaintiff in the spring of 1996 when
25 he complained of ongoing problems with neck pain and asked to have
26 his Labor and Industries claim reopened. (Tr. 199.) (The claim
27 dated to a lifting injury in 1990 which was closed in 1993. (Tr.
28 199; 240.)) After the claim was closed, Plaintiff worked full-time

1 repairing and painting motor vehicles. (Tr. 199.) Dr. Loomis notes
2 that Plaintiff was involved in a motor vehicle accident on September
3 25, 1996. Following the accident, she saw him for an evaluation in
4 October of 1996. Plaintiff expressed considerable complaints of
5 neck pain, left upper back pain, numbness and tingling in both
6 hands, and heaviness in both arms. (Tr. 199.) Plaintiff reported
7 that he was having a lot of difficulty continuing his work at the
8 same level as before the accident. (Tr. 199.) Dr. Loomis referred
9 Plaintiff for a cervical MRI; it revealed prominent disc protrusion
10 at C6-7 which caused moderate cervical spinal canal stenosis at that
11 level. (Tr. 199.) The MRI also revealed a significant bulge at C5-
12 6 with bilateral foraminal stenosis in a small left disc component.
13 At C6-7, Plaintiff had significant foraminal stenosis as well. (Tr.
14 199.) Plaintiff told Dr. Loomis that since the accident he was
15 having problems with fine motor control, including dropping objects.
16 (Tr. 199.) Plaintiff stopped working on November 15, 1996. (Tr.
17 201.) Dr. Loomis noted Plaintiff's relatively normal neurologic
18 exam. She referred him for a hand capacity evaluation. (Tr. 200.)
19 Following this evaluation, she observes that he was assessed as
20 unable to lift more than 15 pounds frequently, and could not use his
21 hands repetitively. (Tr. 200.) The restriction on using his hands
22 repetitively meant that Plaintiff was unable to return to his work
23 as a mechanic. (Tr. 200.) On July 14, 1997, Dr. Loomis summarized
24 Plaintiff's impairments as "significant cervical spondylosis with
25 moderate cervical central canal narrowing causing some impingement
of his spinal cord." (Tr. 200.) On June 18, 1990, (more than a year
27 after Plaintiff's date of last insured), Dr. Loomis stated that
28 Plaintiff was unable to work but would benefit from vocational

1 services when his condition became fixed or treatment concluded.
2 (Tr. 201.) Two years after Plaintiff's date of last insured, on
3 October 3, 1990, Dr. Loomis opined that treatment was likely to
4 restore Plaintiff's ability to work. "I think he'll do very well
5 with treatment." (Tr. 205.) She assessed cervical spondylosis
6 (marked), bilateral shoulder impingement (moderate), and carpal
7 tunnel syndrome ("CTS") (moderate). (Tr. 204.)

8 In assessing Dr. Loomis' opinions, the ALJ first notes that his
9 RFC is generally consistent with the limitations she assessed in
10 1997, in that they both opined Plaintiff could frequently lift or
11 carry 15 pounds, had some restrictions related to the repetitive use
12 of his hands, and cannot perform his past relevant work. (Tr. 27,
13 citing Tr. 200.) The ALJ observes that although Dr. Loomis opined
14 in June of 1998 that Plaintiff was unable to work, she also
15 indicated that once his condition became fixed and stable, he could
16 participate in vocational training. (Tr. 28.) The ALJ found that
17 even though Dr. Loomis is a treating physician, her examinations
18 have been cursory and infrequent: in December of 1996, Dr. Loomis
19 stated that Plaintiff's reflexes were fully intact and muscle
20 strength was grossly intact. (Tr. 28.) The only other report
21 following an examination was a form used to determine eligibility
22 for public assistance, covering October of 1997 to 1999. (Tr. 28.)
23 Thus, between November of 1996 and 1999, Dr. Loomis reported two
24 examinations of the Plaintiff. (Tr. 28.) The ALJ observed that in
25 April of 2000, Plaintiff's treating orthopedist, John Oakley, M.D.,
26 did not opine that he had work-related limitations; rather, Dr.
27 Oakley felt that efforts should be made to try to rehabilitate
28 Plaintiff to return to some type of gainful employment. (Tr. 28;

1 224.) In the context of weighing Dr. Loomis's opinion, the ALJ
2 found Plaintiff less than completely credible. (Tr. 29.) Because
3 much of Dr. Loomis' information was based on Plaintiff's unreliable
4 self reporting, the ALJ found that her opinions were entitled to
5 less weight. (Tr. 28.)

6 With respect to Dr. Loomis' diagnosis of CTS, the ALJ notes
7 that Plaintiff was diagnosed with mild carpal tunnel syndrome
8 between 1989 and 1992, but the record does not contain an EMG or
9 document any treatment for this condition during the applicable time
10 frame. (Tr. 26, citing Tr. 163-174.) The ALJ outlined the evidence
11 pertaining to CTS: (1) mild CTS is diagnosed in December of 1996;
12 (2) a 2001 independent medical exam (IME) refers to an EMG in
13 October of 1997 confirming the diagnosis of mild right CTS; but
14 there is no evidence in the record of this EMG; and (4) Plaintiff
15 received no treatment for CTS. (Tr. 26, citing 242.) The ALJ also
16 observed that Larry Lamb, M.D., performed conduction studies in
17 October of 1999 (about one year after the date of last insured) and
18 found that Plaintiff's history of carpal tunnel had, for the most
19 part, normalized. (Tr. 212.) Doctors who performed an IME nine
20 years after the date of last insured found no evidence of carpal
21 tunnel syndrome. (Tr. 172.) The ALJ concluded that, prior to
22 Plaintiff's date of last insured, he had mild CTS; "however, there
23 was no objective evidence to support this." (Tr. 27.) The ALJ
24 concluded that during the relevant time frame, Plaintiff's mild
25 carpal tunnel syndrome did not impose more than a minimal limitation
26 on his ability to do work-related activities. (Tr. 27.) With respect
27 to Plaintiff's complaints of right knee and foot pain, the ALJ
28 observed that there was no medical diagnosis until about three years

1 after his insured status expired. (Tr. 27.) Similarly, the ALJ did
2 not include a right knee impairment because the problem was
3 diagnosed, treated and resolved by May of 1992, several years before
4 the onset date. (Tr. 26.) The ALJ notes that Dr. Parker tested
5 Plaintiff following his 1996 complaint of tinnitus. (Tr. 20-21,
6 citing Tr. 186.) Audiologic testing showed moderate to severe high
7 frequency sensorineural hearing loss bilaterally; however,
8 Plaintiff's acoustic reflexes were normal, as was his ability to
9 discriminate speech. Dr. Parker discussed tinnitus management
10 strategies with Plaintiff. (Tr. 21, citing Tr. 186.) The ALJ
11 appropriately did not include it as a severe impairment.

12 To the extent that Dr. Loomis' opinions were not consistently
13 supported by diagnostic testing, laboratory reports or clinical
14 findings, the ALJ gave them less weight. (Tr. 28.)

15 Plaintiff asserts that the ALJ ignored the medical opinions
16 given by the Plaintiff's treating physician. (Ct. Rec. 13 at 10.)
17 Rather than "ignoring" Dr. Loomis' opinions, the ALJ carefully
18 considered and adopted those which were supported by other evidence
19 in the record. As outlined herein, when the ALJ discounted portions
20 of Dr. Loomis' opinions, such as her belief that Plaintiff could not
21 work in June of 1990, he gave specific and legitimate reasons for
22 doing so, including her very infrequent contact with Plaintiff, and
23 the lack of medical records pertaining to the relevant time frame.
24 The ALJ's weighing of the medical evidence is supported by the
25 record and free of legal error.

26 **C. Residual Functional Capacity (RFC)**

27 Plaintiff also disputes the ALJ's determination that he
28 retains the residual functional capacity to perform a wide range of

1 light work. (Ct. Rec. 13 at 9-11.) The Commissioner responds that
2 the ALJ's determination is supported by the medical evidence and by
3 his credibility assessment. (Ct. Rec. 17 at 12-16.)

4 When presented with conflicting medical opinions, the ALJ must
5 determine credibility and resolve the conflict. *Matney v. Sullivan*,
6 981 F.2d 1016, 1019 (9th Cir. 1992). "[T]he Commissioner must
7 provide clear and convincing reasons for rejecting the
8 uncontradicted opinion of an examining physician. . . . [T]he
9 opinion of an examining doctor, even if contradicted by another
10 doctor, can only be rejected for specific and legitimate reasons
11 that are supported by substantial evidence in the record." *Lester*
12 v. *Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995) (citations and
13 internal quotation marks omitted).

14 Plaintiff's argument with respect to the RFC is the same as his
15 second argument: he disagrees with the ALJ's weighing of the medical
16 testimony.

17 Plaintiff challenges the determination that he lacked
18 credibility. He contends that this finding "is not based on any
19 convincing evidence." (Ct. Rec. 13 at 11.) Credibility
20 determinations do bear on the evaluation of medical evidence when an
21 ALJ is presented with conflicting medical opinions. *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). It is the province of
22 the ALJ to make credibility determinations. *Andrews v. Shalala*, 53
23 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must
24 be supported by specific cogent reasons. *Rashad v. Sullivan*, 903
25 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical
26 evidence of an underlying impairment, the ALJ may not discredit his
27 testimony as to the severity of an impairment because it is
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1 unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715,
2 722 (9th Cir. 1998). Absent affirmative evidence of malingering,
3 the ALJ's reasons for rejecting the claimant's testimony must be
4 "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.
5 1995). "General findings are insufficient: rather the ALJ must
6 identify what testimony is not credible and what evidence undermines
7 the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
8 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Factors the ALJ may
9 properly consider include the claimant's reputation for
10 truthfulness, prior inconsistent statements, unexplained failure to
11 seek medical care or to follow a prescribed course of treatment, and
12 the claimant's activities of daily living. See *Thomas v. Barnhart*,
13 278 F. 3d 947, 958-959 (9th Cir. 2002).

14 There is evidence of malingering in the record. An IME in 2001
15 notes that Plaintiff "consistently throughout the exam grimaces,
16 grunts, groans, and shows other manifestations of pain
17 magnification. (Tr. 246.) The orthopedist found no specific evidence
18 of objective abnormality on clinical exam, but found significant
19 evidence of marked symptom embellishment and pain magnification
20 behavior. (Tr. 248.) Allen Bostwick, Ph.D., examined Plaintiff on
21 September 25, 2002, and opined after testing: "his Validity Scale
22 profile reflects frank malingering of psychopathology." (Tr. 280.)

23 The ALJ found a minimum of four reasons to doubt Plaintiff's
24 credibility: (1) Plaintiff alleged disabling impairments, but no
25 treating or examining doctor, except Dr. Loomis, opined that he was
26 unable to work during the period at issue, and even she felt that
27 Plaintiff would respond well to treatment and be able to work after
28 vocational training; she did not opine that Plaintiff was

1 permanently disabled. (Tr. 29, 201, 205.) (2) The record is void of
2 any reported limitations by the claimant during the period at issue.
3 (Tr. 29.) (3) Plaintiff's neurological exams have all been
4 essentially within normal limits. (Tr. 29.) (4) Several examining
5 physicians observed that Plaintiff embellishes his symptoms,
6 exaggerates and is malingering; Plaintiff's self-reports are
7 therefore not fully reliable due to his tendency to exaggerate his
8 difficulties. (Tr. 29, 246, 274, 280.)

9 When the ALJ weighed Dr. Loomis' opinion, he properly
10 considered that some of her assessment was based in part on
11 Plaintiff's unreliable self-reporting. (Tr. 28.) The court finds
12 that the ALJ appropriately considered the medical evidence, as well
13 as Plaintiff's credibility, in determining his residual functional
14 capacity assessment. With respect to the ALJ's residual functional
15 capacity assessment, the ALJ's reasons for finding Plaintiff capable
16 of a wide range of light work are fully supported by the medical
17 evidence (including examining and consulting physicians' findings),
18 objective test results, and by his credibility determination. The
19 ALJ's assessed RFC is supported by the record and free of legal
20 error.

21 **D. Vocational Expert**

22 Plaintiff contends that the ALJ's hypothetical question to the
23 vocational expert was flawed because it did not include all of his
24 medically supported limitations. (Ct. Rec. 13 at 10-12.) The
25 Commissioner responds that the ALJ included all of the impairments
26 established by the medical evidence. (Ct. Rec. 20 at 5-7.)

27 Plaintiff's argument is the same, that the ALJ did not weigh
28 the medical evidence, particularly with respect to his mental

1 impairment, in the way he wished. For the reasons articulated
2 herein, the court finds that the ALJ's hypothetical included all of
3 the limitations established by the competent medical and other
4 evidence during the relevant time frame.

5 **IT IS ORDERED:**

6 1. The Defendant's Motion for Summary Motion (**Ct. Rec. 16**) is
7 **GRANTED**.

8 2. The Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**)
9 is **DENIED**.

10 3. The Clerk of the Court is directed to file this Order and
11 provide a copy to counsel for Plaintiff and Defendant. Judgment
12 shall be entered for Defendant, and the file shall be closed.

13 DATED January 30, 2007.

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S/ CYNTHIA IMBROGNO
16 UNITED STATES MAGISTRATE JUDGE
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